Supreme Court of Pennsylvania, May 1852.

MARY HEADLEY *vs.* ANN KIRBY.

1. A gift of all the donor's property, in prospect of death is a will, and not a *donatio causa mortis.* It is not valid unless executed either as a written or as a nuncupative will.
2. In support of an alleged *donatio mortis causa*, the evidence was, that the decedent said, in extremis to the donee, "Ann, I am dying; all I have is with you, and all is yours; do what you can for me; there are my keys." The decedent had then in her room two trunks, one containing clothing, and the other a non-negotiable note, and a deposite book with a saving fund society, and other articles. The beneficiary thereupon took the keys, which were hanging at the bed-side, in the presence of the donor. Held, that the Court below erred in permitting the evidence to go to the jury.
3. Cases of donations *mortis causa*, are exceptions, not to be extended by way of analogy.

Error from the District Court of Philadelphia.

This was an action of replevin brought by the plaintiff, as administratrix of Patience Kirby, deceased, to recover from the defendant certain articles of wearing apparel, some jewelry and plate, a note for $1,600, payable on demand, but not negotiable, and a book of deposit in the Philadelphia Saving Fund Society: all of which had been the property of the decedent. The defence was, that these articles had been given to the defendant as a *donatio mortis causa.*

On the trial of the case, the following facts were, in substance, proved:—

Patience Kirby, the deceased, had, a few days before her death, come to the residence of the defendant, who was her sister-in-law, but with whom however she had not been previously on terms of intimacy, bringing with her all her property, which was personalty, and had rented two rooms, at a small sum a week. Some of the articles which were the object of suit, were contained in two trunks, one about eighteen inches long, in which were the note and deposit book, and some other matters; others were placed in a band-box, or hung up in a closet. The decedent, shortly after her arrival, being

taken suddenly ill, was found by members of the family who came in to her assistance; half raised in her bed, she told them she was dying, and asked to be lifted up, which was done by the defendant. She then said to the latter, according to the witnesses for the defence, "Ann, I am dying, all I have is with you, and all is yours, do what you can for me, there are my keys;" or words of similar purport. The defendant thereupon laid her down and took the keys, which hung at the side of the dressing-glass, close by the bed, in her presence, and put them in her pocket; the decedent was said to have been perfectly calm and sensible at the time, but died in a few minutes. After her death, the defendant opened the trunks, and took possession of the effects, claiming them at first, as under a *nuncupative* will, but being advised that it was ineffectual as such, and failing subsequently to get administration, then as a gift *mortis causa*.

In rebuttal, witnesses for the plaintiff testified that the defendant, and one of the witnesses, had repeated the words relied on as creating a gift, shortly after Patience's death, in this form. "Ann, I am dying, everything is with you, have *everything done for me*." It was also offered to show that there had been a want of affection on the part of the decedent towards the defendant, and that she had, in fact, often expressed her dislike to her; but the testimony was rejected as irrelevant.

It must be also remarked, in regard to the deposit book, that the seventh of the rules of the Saving Fund, which rules depositors are obliged to sign, provides that no check or order for the payment of money shall be accepted; and that no transfer or assignment of the money belonging to a depositor shall be recognized. In case of the death of any depositor, payment is to be made only to the executors or administrators, unless some person be appointed during the lifetime of the depositor, in a book kept upon the office, or some disposition be made of the deposit by will.

The defendant's counsel then requested the charge of the Court to the Jury upon the following points submitted by them in writing.

1. If the goods and chattels mentioned in the declaration were secured under locks and keys, and were given by the deceased to

the defendant, the delivery of the keys is a sufficient delivery of the articles in order to constitute a valid *donatio mortis causa.*

2. If the deceased at the time of the gifts parted with all dominion over them, it is sufficient to render the gifts valid as *donationes mortis causa.*

3. A note of a third party payable to deceased, is a proper subject of a *donatio mortis causa.*

4. The book in which is entered an acknowledgment of money deposited as a loan with the Philadelphia Saving Fund Society, such acknowledgment being in the handwriting of the officer of the Company, is an evidence of debt which may be a proper subject of a *donatio mortis causa;* a delivery of the book is a sufficient delivery by which the right to the money loaned may pass.

The learned Judge charged the jury, that if the facts related by defendant's witnesses were believed by the jury, they were sufficient to establish a valid *donatio mortis causa.*—"The question for the jury would be," he said, "did the decedent use words sufficient to declare her intention to give all her property to the defendant, and if so, did she do so under the immediate expectation of death, and that she died a few minutes afterwards, is not in dispute. If so, the gift is valid as a *donatio mortis causa.* These are questions for the jury. The defendant's 1st, 2d, and 3d points are correct. The fourth point I negative, but reserve the point for the Court in banc." The plaintiff's counsel thereupon excepted.

The jury having found for the defendant, the Court subsequently gave judgment for her upon the point reserved, declaring that the gift of the said book of account and deposit was sufficient to pass the money, as a valid *donatio causa mortis.* To which opinion the counsel of the plaintiff also excepted.

The rejection of the evidence as to the state of feeling of the decedent towards the defendant, the answers of the Court to the points proposed, and the charge of the Court were assigned for error.

Mr. SHEPPARD and Mr. MEREDITH, for the plaintiff in error, cited *Wells* v. *Tucker*, 3 Binn. 370; *Yarnell's Will*, 4 R. 62; *Duffield* v. *Elwees*, 1 Dow. P. C. N. S. 1; *Prince* v. *Hazleton*, 2

Johns, 502; *Harris* v. *Clark*, 3 Comst. 121; *Ward* v. *Turner*, 2 Ves. 431; *Nicholas* v. *Adams*, 2 Wh. 17; *Hedges* v. *Hedges*, Prec. Ch. 269; *Shargold* v. *Shargold*, 2 Ves. 431; *Irons* v. *Smallpiece*, 2 B. & Ald. 551; *McDowell* v. *Murdock*, 1 N. & M. 237; *Meadows* v. *Mitchell*, 1 Murphy, 127; *Sims* v. *Walker*, 8 Humph. 503; *Bunn* v. *Markham*, 7 Taunt. 224; *Gratton* v. *Appleton*, 3 Story, 755; *Smith* v. *Smith*, Str. 955; *Jones* v. *Shelby*, Prec. Ch. 300; *Hawkins* v. *Blewitt*, 2 Esp. 663; *Riddel* v. *Dobree*, 10 Sim. 244; *Miller* v. *Jeffries*, 4 Gratt. 472; *Miller* v. *Miller*, 3 P. Wms. 356; *Bradley* v. *Hunt*, 5 G. & J. 45; *Gardner* v. *Parker*, 3 Madd. 182; *Harris* v. *Clark*, 2 Barb. Sup. C. 94: 3 Com. 121; *Tate* v. *Hilburt*, 2 Ves. jr. 111; *Tafnell* v. *Constable*, 8 Sim. 69; *Edwards* v. *Jones*, 1 M. & C. 226; *Batten on Contract*, p. 40; *Bryson* v. *Browning*, 9 Ves. jr. 4; *Manderville* v. *Welsh*, 5 Wheat. 285; *Pennington* v. *Gitting*, 2 G. & J. 210.

Mr. MANN and Mr. BRIGHTLY, for the defendants in error, cited, *Toller* on Ex'rs., 233. Inst. lib. I. tit. 7; 2 *Domat*, 93, 475; 2 P. L. J. 50; *Harris* v. *Clark*, 3 Comst. 113; *Jones* v. *Selby*, Prec. Ch. 300; *Smith* v. *Smith*, Str. R. 955; *Ward* v. *Turner*, 2 Ves. 431; *Wilkes* v. *Ferris*, 5 Johns. 535; *Miller* v. *Jeffries*, 4 Gratt. 479; *Chevalier* v. *Wilson*, 1 Texas, 171; *Bradley* v. *Hunt*, 5 G. & J. 54; *Wells* v. *Tucker*, 3 Binn. 366; *Gardner* v. *Parker*, 3 Madd. 185; 1 Lead. Cas. Eq. 617; *Soutant* v. *Schuyler*, 1 Paige, 316, 318; *Holley* v. *Adams*, 16 Verm. 206, 211; *Grover* v. *Grover*, 24 Pick. 261, 264, 266; *Borneman* v. *Borneman*, 15 Maine, 429; 19 Ibid. 225; 21 Ibid. 185; *Brown* v. *Brown*, 18 Conn. 410, 413; *Parrish* v. *Stone*, 14 Pick. 198, 204–5; *Harris* v. *Clark*, 2 Barb., S. C. 94, 98; *Miller* v. *Miller*, 3 P. Wms. 356; *Hill* v. *Chapman* 2 Bro. C. C. 612; *Drury* v. *Smith*, 1 P. Wms. 404; *Gold* v. *Rutland*, 1 Eq. Cas. Abr. 346; *Jones* v. *Selby*, Prec. Ch. 300; *Duffield* v. *Elwes*, 1 Bligh's N. R. 514; *Dow* v. *Hicks*, 1 Dow. & Clark, 1.

May 15th, 1852. The opinion of the Court was delivered by

LOWRIE, J.—Though we derive the law as to *donationes mortis causa* from the Roman lawyers, yet their rules on that subject are no

guide to us in the administration of our law; for the stringent severity of their law of wills, occasioned and excused larger equitable exceptions by way of gifts in prospect of death, than can at all be sanctioned under our much more reasonable statute of wills. But even with them, these gifts were so carefully guarded, that however they might infringe upon the rules as to testamentary dispositions, they could not readily give rise to fraud, for every such gift was invalid unless proved by five witnesses, present at the time, every one of whom was required to be a Roman citizen, of full age, of good character, and not related to either donor or donee, a regulation not belonging to our law of evidence.

In the Roman law (Just. 2, 7, 1; 2 Domat. 4, 1, 3, 2—6,) as well as in our own, (2 Ves. jr. 120; 2 Swanst, 98) these donations are regarded as of the same nature as testamentary dispositions, and such is manifestly their character. We shall therefore take but a one-sided view of such gifts, if in considering them, we neglect the spirit of our law of wills; and it is not necessary here to point out the care which some courts have taken to prevent this exception to the law of wills from making any further invasion upon that law.

So far as regards property, a will is the declaration of one's intention as to the disposition of it after his death; and our law on that subject is very clear in defining the form of such a will. Considering that our present statute is substantially a mere repetition of the law as it has existed ever since 19 Charles 2, it is perhaps too late to attempt, without legislative direction, to reclaim it from the exceptions which have been made in favor of these donations; but we may, and must restrain the effect of those exceptions, so as to prevent them from becoming themselves a general rule.

The gift in the case before us proposes to embrace all the donor's property, and to be made in prospect of death, and is therefore a will, if it receive the sanction of law. The claim that such a thing can be, is a startling consequence of the exceptions in favor of *donationes mortis causa;* and it is not possible to say that such a consequence may not be arrived at if we follow the analogies of those exceptions without looking at our statute, and without regard-

ing the maxim, *quod contra rationem juris receptum est non est producendum ad consequentia.*

This case is so entirely peculiar in its character, that if we take our statute of wills as the general rule for such dispositions, as we are bound to do, and treat cases of *donationes mortis causa* as exceptions which are not to be extended by way of analogy, then we are clear of all embarrassment as to the principle on which the case is to be decided. It is not pretended that any gift like this has ever been held good, and it may be safely declared that no mere gift made in prospect of death, and professing to pass all one's property to another, to take effect after death, can be valid under our statute of wills, no matter what delivery may have accompanied it. If this is not true, then it is plain that the statute of wills, so far as it is intended to exclude all modes of disposing of personal property at death, which it does not provide for, is repealed by the decisions of the courts

It is not necessary to point out the danger of sustaining such a donation as this, for no thinking mind can fail to see it; and it was this very consideration which led to the precautions which are provided in the statute on the subject of nuncupative wills. We cannot even glance at these precautions, without seeing that they were designed to defeat a gift sustained by such evidence as was given in this case, and to prevent oral dispositions, in the nature of last wills, from being made under such suspicious circumstances. The court ought to have instructed the jury that such evidence could not establish a *donatio mortis causa*, or to have ruled out the whole evidence *as insufficient.*

Judgment reversed and new trial awarded.[1]

New York Supreme Court, Albany, February 18, 1852.

JOHN COSTIGAN *v.* JOHN NEWLAND.

Where an agent rightfully receives money for his principal, which ought to be paid over by the principal to a third person, such third person cannot maintain an

[1] See ante, page 1; and for a new point on the subject of this case, see Moore *v.* Darton, 7 Eng. L. & E. Rep. 134.